300-Plus Corporate Giants Back Discovery Rules Overhaul

By **Greg Ryan**

Law360, New York (February 14, 2014, 6:11 PM ET) -- More than 300 of the largest companies in energy, life sciences, technology and other sectors voiced their support Thursday for proposed changes to the federal discovery rules, though they suggested further restrictions on the types of evidence destruction or loss that warrant sanctions.

A rules committee for the U.S. Judicial Conference, the body of judges, attorneys and others that helps set policy for federal courts, proposed a host of **discovery-related changes** to the Federal Rules of Civil Procedure in August. Among the proposed changes are reductions to the number of depositions, interrogatories and requests for admissions each party in a suit is presumed to be allowed, as well as a reduction to the presumptive maximum length for depositions.

In a letter to the committee, general counsel and executives for the companies praised the proposal for improving the discovery requirements currently in place, which they described as inefficient, confusing and overly expensive. Companies are currently obligated to preserve reams of data that have no relevance to a lawsuit, and in many cases they overpreserve information in order to avoid penalties from judges, according to the letter.

"Taken together, these proposed amendments will address the burdens of both overpreservation and overbroad discovery," the companies said. "More importantly, they will begin to reverse the trend favoring resolution of cases based on costs, rather than on the merits."

Among the signatories to the letter were American International Group Inc., Bank of America Corp., BP America Inc., Exxon Mobil Corp., General Electric Co., Google Inc.,Johnson & Johnson, Merck & Co. Inc., Microsoft Corp., NBCUniversal Media LLC, Toyota Motor Sales USA Inc. and Wal-Mart Stores Inc.

The companies expressed explicit support for the **proposed changes to Rule 37(e)**, which governs sanctions for litigants that fail to preserve information relevant to a case. Under the proposal, sanctions are limited to actions that "caused substantial prejudice in the litigation and were willful or in bad faith" or that "irreparably deprived a party of any meaningful opportunity to present or defend" against allegations.

By contrast, the only direction provided in the current version of Rule 37(e) is a bar on sanctions against parties that lost information through "the routine, good faith operation of an electronic information system."

However, the companies suggested that the committee tweak the proposal so that sanctions are reserved for parties who show "a specific intent to deprive another party of discoverable information." In addition, so-called curative measures should require "a showing of significant prejudice" to a litigant, they said.

Critics of the 37(e) changes, particularly plaintiffs attorneys, have argued the proposal goes too

far. Knowing there is little chance they will suffer sanctions for failing to hold onto evidence, companies will be more likely to get rid of it, they say.

The companies also singled out the changes to Rule 26(b), which governs the scope and limits of discovery, for praise. The rules committee has proposed inserting language requiring the scope of discovery to be proportional to a case's stakes, including the amount of money at issue and the resources of each party.

The companies said they were especially pleased by the proposed elimination of the following phrase from Rule 26(b), which they described as confusing: "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

"This phrase has been abused by parties and misconstrued by many courts. As a result, it has stretched the scope of discovery beyond the reasonable intention of its original drafters," they said.

The public comment period closes on Feb. 15.

--Editing by Emily Kokoll.